No. 17-1107

In The Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* HISTORIANS, LEGAL SCHOLARS, AND CHEROKEE NATION IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae listed in the Appendix are historians and legal scholars, many of whom have expertise in Oklahoma history and who teach and write about federal Indian policy and tribes. The Cherokee Nation, one of the "Five Civilized Tribes" ("Five Tribes"), has an interest in ensuring that this Court is correctly informed as to the legal history of the Five Tribes in the context of federal law. *Amici* file this brief in support of the respondent.[1]

SUMMARY OF THE ARGUMENT

The Muscogee (Creek) Nation ("Creek Nation") has maintained a strong and resilient government on its reservation since its removal to Indian Territory in the 1830s. The federal allotment and statehood legislation involving Creek Nation near the end of the nineteenth century and the early part of the twentieth century was consistent with the contemporaneous implementation of federal allotment and assimilation policies throughout the United States. The survival of Creek Nation and its reservation is all the more remarkable in light of federal agency suppression of its

[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. On August 14, 2018, counsel for Petitioner and Respondent informed counsel for *Amici* of their consent to the filing of this *amicus* brief.

government, and the United States' failure to protect Creek citizens and their allotments from rampant land frauds perpetrated throughout the reservation in the early twentieth century. This fraud was aided by the state's unlawful exercise of criminal jurisdiction over offenses on the Creek reservation.

Immediately after statehood, Oklahoma ignored federal statutes and state and federal court precedent concerning the jurisdictional status of Indian country. Meanwhile, federal officials waffled in their position regarding the enforcement of federal statutes applicable to reservations and, until the 1970s, brought few prosecutions for forgery, fraud, or murder on Indian country in Oklahoma, including crimes related to the taking of Indian lands and minerals.

For the past 111 years, there has been an unsuccessful state campaign to secure judicial acceptance of the legal fiction that Indian lands in Oklahoma do not have the same jurisdictional status as Indian lands in other states. This campaign ignores decades-old state and federal court decisions that allotment legislation in the late 1890s and early 1900s applicable to the former Indian Territory did not destroy the Indian country status of Indian allotments, tribal fee lands, and tribal trust lands or grant jurisdiction over these lands to the state. The reasoning in those decisions applies to reservations the same as it applies to these other forms of Indian country.

ARGUMENT

I. CONGRESS'S TREATMENT OF CREEK NATION WAS CONSISTENT WITH THE ASSIMILATION AND ALLOTMENT ERAS AND THE END OF THOSE ERAS.

A. Creek Reservation and the Assimilation and Allotment Policy in Indian Territory

Creek removal and the establishment of the Creek reservation in Indian Territory in the 1830s was consistent with contemporaneous federal policy that Indians should be separated from non-Indians and placed on reservations. FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 2-3 (1984). After removal, the Five Tribes occupied their land under federal superintendence in an area that was "widely separated from white communities." *Marlin v. Lewallen*, 276 U.S. 58, 60-62 (1928). The Creek Nation initially secured fee title to its lands under an 1833 Treaty, such title to continue so long as it should exist as a nation and continue to occupy the country assigned to it. Treaty with the Creeks, Feb. 14, 1833, 7 Stat. 417. This title was later evidenced in a Presidential patent dated August 11, 1852. *Woodward v. De Graffenried*, 238 U.S. 284, 293-94 (1915).

The Creeks, a "peace-loving people," rebounded after removal. GRANT FOREMAN, THE FIVE CIVILIZED TRIBES: CHEROKEE, CHICKASAW, CHOCTAW, CREEK, SEMINOLE CIVILIZATION OF THE AMERICAN INDIAN 203 (1934). They built homes and ranches; established schools, including boarding schools; maintained ferries; and

were organized by tribal towns. ANGIE DEBO, THE ROAD TO DISAPPEARANCE – A HISTORY OF THE CREEK INDIANS 17, 19, 110, 116-21, 289, 332-33 (1941) ("ROAD"). They maintained a government under written constitutions, the most recent of which, before statehood, was the 1867 Constitution, with executive, legislative and judicial branches. *Woodward*, 238 U.S. at 293-94; DEBO, ROAD 179-80. They maintained a lighthorse police force and exercised civil and criminal jurisdiction with a judiciary applying an array of Creek laws and rules. DEBO, ROAD 181-82.

After the civil war, westward expansion caused a "shrinking reservoir of 'vacant' land." HOXIE 43. Federal policy began to shift, in part due to political, economic, and commercial expansion, and the efforts of well-meaning East Coast reform associations that campaigned for Indian equal rights. HOXIE 2-3, 11-13. The resulting assimilation and allotment policy became a dominant force in the late 1800s. Congress wanted Indians to receive their share of tribal lands, allow settlers to acquire the remaining lands, help Indians learn farming from non-Indian farmers, and transform Indians into prosperous citizens. D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 8-9, 12-22, 77-80 (Francis Paul Prucha ed., University of Oklahoma Press 1973) ("OTIS"); HOXIE 75. Reservation dismantlement and tribal dissolution nationwide were also goals held by some federal policy makers, especially early in the allotment era. *Id.* at 11-12; 1885 Ann. Rep. of Comm. Ind. Aff. 26 (Oct. 5, 1885).

Congress sought to implement the assimilation and allotment policy nationwide for a number of reasons. None of these reasons suggest or support a theory that allotment, reservation disestablishment, or tribal dissolution were prerequisites for the formation of Oklahoma or any other state.

Critics characterized Indian reservations (regardless of whether owned by the United States in trust for the benefit of a tribe, or, in the case of Creek Nation, owned by the tribe in fee for the benefit of tribal members) as "communist." OTIS 11, 54-55. Criticism of communal ownership was a major factor in the federal push to allot lands in Indian Territory, where it was reported that a relatively small number of tribal citizens maintained control over large areas of land, contrary to treaties expressing intent that tribal lands were to be held by tribes for benefit of all tribal citizens. *Heckman v. United States*, 224 U.S. 413, 434, 438 (1912); *see also Woodward*, 238 U.S. at 297, 305. Allotment was intended to eliminate these land monopolies, to enable tribal citizens to enjoy equal benefit of the land as required by treaties, and "to educate the Indians in the benefits to be derived from separate occupancy and enjoyment of the land." *Woodward*, 238 U.S. at 297 n. 2, 309.

The outcry for lands by the large non-Indian population that surrounded reservations in the western United States by the late nineteenth century was another precipitating factor. As Texas and Kansas "began to be filled up with settlers, longing eyes were turned by many upon this body of land lying between them,

occupied only by Indians." *Smith v. Townsend*, 148 U.S. 490, 493 (1893). The non-Indian population flowed onto tribal lands in Indian Territory, *Marlin*, 276 U.S. at 58, 61-62, disregarding repeated proclamations by successive presidents "warning against such entry and occupation" in 1879, 1880, 1884, and 1885. *Smith*, 148 U.S. at 495-96. This influx included settlement in towns mostly occupied by non-Indians who, while having no legal claim to the underlying land, erected improvements "worth many thousands of dollars." *Johnson v. Riddle*, 240 U.S. 467, 476-77 (1916). This caused Congressional concern regarding the "equities" between the tribes who owned the lands and the non-citizens who had built the town site improvements. *Id.* at 477.

As a "logical part" of the allotment policy there were "frequent allusions to the fact that the Indians were of course making no use of natural resources which should be developed in the interests of civilization." OTIS 17-18. The rich Five Tribes natural resources added to the interest in removing tribal title through allotment and potentially making these resources, some of which were already subject to non-Indian development, even more accessible. These tribal natural resources included coal valued at more than $4.3 billion, timber, lands suitable for game preserves, and huge tribal oil and gas resources. 40 Cong. Rec. 1257 (1906) (statement of Mr. Reid); 40 Cong. Rec. 3213, 4390-92 (1906) (statement of Sen. LaFollette); DEBO, ROAD 197, 368; LOUIS WELSH ET AL., A HISTORY OF THE GREATER SEMINOLE OIL FIELD 6-7 (1981); "Oil

Fields Are Best in the World," Oklahoman, Mar. 26, 1905, at 1.

B. Allotment Process

In 1887, Congress enacted the General Allotment Act, also known as the Dawes Act. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. Lands of many tribes were allotted under this law, but it expressly excluded the Five Tribes and a few other Indian Territory tribes. *Id.* at § 8. An organization supporting allotment suggested, "Reservations should be taken first which are ripest for the work, where the way is clear, the risks small, the complications few." HOXIE 79. There was doubt in Congress whether it "had any authority to interfere with the rights of those Indians" in Indian Territory. 18 Cong. Rec. 191 (1886) (statement of Mr. Perkins).

Even after decisions by this Court recognizing the federal plenary power to achieve allotment with or without tribal consent, *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902), and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), federal officials were still concerned that the conveyance of Five Tribes' fee title to their lands would be of questionable legal validity without tribal consent, and took the safer route by seeking agreements requiring execution of deeds by tribal officials. *Woodward*, 238 U.S. at 294-95, 307. While ending communal tribal title to land was not necessary to achieve statehood, it was a core feature of allotment policy; and allotment in the Indian Territory, as elsewhere, was viewed by some proponents as

facilitating eventual access to reservation lands by non-Indians.

The steadfast resistance of the Five Tribes to engage in negotiations for allotment of their lands led to the establishment of the Commission to the Five Civilized Tribes ("Dawes Commission"). Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 643-45. It required ten years of negotiations for the Dawes Commission to secure allotment agreements with all Five Tribes – but only after enactment of the coercive laws described in part III.B.3 of this brief.

C. End of Allotment Era

The allotment era was short-lived. "In the early twentieth century" policy makers were "questioning whether total assimilation was desirable at all" and believed that "ambitious assimilation programs could not succeed." HOXIE 112-13. Thus, "in the first decade of the 20th century . . . [t]otal assimilation was no longer the central concern of policy makers. . . ." *Id.*

In 1906, Congress withdrew plans to dissolve the Five Tribes, and continued tribal existence indefinitely. S.J. Res. 37, 59th Cong., 34 Stat. 822 (1906); Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148 ("Five Tribes Act"). A few years later, Congress ended the allotment of Creek lands. Act of Mar. 2, 1917, ch. 146, § 18, 39 Stat. 969, 983.

The 1934 Indian Reorganization Act ("IRA") officially ended the allotment era for all tribes. Act of June

18, 1934, ch. 576, Pub. L. No. 96-363, 48 Stat. 985, codified as amended at 25 U.S.C. §§ 5101, *et seq*. Most of the IRA applied to Oklahoma tribes, including provisions ending allotment, authorizing the Secretary to acquire lands for tribes and individual Indians and restore surplus reservation lands to tribal ownership, and establishing an Indian preference in federal employment. *See* §§ 1-3, 5, 6, 8-15, and 19, 48 Stat. 985, codified as amended at 25 U.S.C. §§ 5101-5103, 5108, 5109, 5111-5113, 5115, 5116, 5118, 5120, 5121, and 5129. Section 13, codified at 25 U.S.C. § 5118, provided that five IRA sections were inapplicable to Oklahoma tribes. These addressed transfers of restricted lands, proclamation of new reservations, organization under tribal constitutions and charters of incorporation, and tribal elections to accept or reject applicability of the IRA. §§ 4, 7, 16, 17, 18, 48 Stat. 985, codified at 25 U.S.C. §§ 5107, 5110, 5123, 5124, and 5125.

Two years after the IRA's passage, Congress enacted the 1936 Oklahoma Indian Welfare Act ("OIWA"), Act of June 26, 1936, ch. 831, 49 Stat. 1967, codified as amended at 25 U.S.C. §§ 5201-5210. The OIWA included a section similar to the IRA sections concerning tribal constitutions and corporate charters, and repealed all acts or parts of acts inconsistent with the OIWA. 25 U.S.C. §§ 5203, 5209.

II. UNLAWFUL FEDERAL AGENCY INTERFERENCE WITH CREEK GOVERNMENT OBSTRUCTED TRIBAL PROTECTION OF ALLOTTED LANDS FROM STATE-SANCTIONED FRAUDULENT LAND TRANSACTIONS.

A. Introduction

Soon after the enactment of the Dawes Act, federal policy began to shift from treating Indian affairs as national concerns to viewing them as regional concerns, resulting in control by congressional members from states and territories west of the Mississippi. HOXIE 11, 12, 36-37, 104. Participation in Congress by western states with significant Indian populations (North and South Dakota, Montana, Washington, Utah, Wyoming, Idaho, Oklahoma, Arizona, and New Mexico) began upon each state's entry into the Union during a period between 1889 and 1912. *Id.* at 108. The western legislators were hostile to the campaign to achieve total assimilation. *Id.* at 111. "Optimism and a desire for rapid incorporation were pushed aside by racism, nostalgia, and disinterest." *Id.* at 113.

Consistent with changing federal policy early in the twentieth century, officials of the Department of the Interior ("DOI") and DOI's agency, the Bureau of Indian Affairs ("BIA"), unlawfully blocked Creek exercise of executive and legislative powers. This occurred simultaneously with the theft of Creek allotments through fraudulent land transactions sanctioned by the state, resulting in the impoverishment of Creek citizens. Due to "the inherent difficulty" in protecting

allotments, "the general effect of allotment was an orgy of plunder and exploitation probably unparalleled in American history." ANGIE DEBO, AND STILL THE WATERS RUN – THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 91 (1940) ("WATERS RUN").

B. Federal Agency Obstruction of Creek Government

The Creeks did not desire tribal dissolution and did not seek it during the allotment process, as shown by their determined struggle to resist allotment and to continue to exercise governmental powers after statehood. DOI nevertheless engaged in "bureaucratic imperialism" through its "deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments," contrary to Congress's express preservation of Five Tribes governments in the Five Tribes Act, § 28, 34 Stat. 137. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

DOI's "efforts to ensure that any Creek government be subservient to Bureau wishes" began in 1907, shortly before statehood. *Harjo*, 420 F. Supp. at 1133. DOI claimed the Five Tribes Act's continuance of Five Tribes governments only applied to present incumbents in office. *Id.* at 1129, 1131-32, 1137. It also misinterpreted § 6 of the Five Tribes Act to justify its refusal to recognize any elected Chief absent a federal appointment, contrary to that section's limited purpose: to prevent disruption of the signing of allotment

deeds in the absence of an elected chief. *Id.* at 1126-27, 1132, 1138, 1141. For many years, DOI refused to recognize tribal elections to fill Council vacancies, refused to recognize the Chief's authority to call regular Council sessions without DOI approval, and often treated the Chief as the sole Creek governmental authority. *Id.* at 1114, 1133-34, 1139.

Creek leaders resisted, and began to hold the first of many annual "Creek Conventions" ("Convention") in 1909. *Harjo*, 420 F. Supp. at 1133. The Convention continued to meet regularly for decades, often without BIA recognition of its legitimacy. *Id.* at 1133-38. Between 1934 and 1951, the Chief, who was elected by the people and then appointed by DOI, and the Convention functioned much as the Council and Chief had earlier. *Id.* at 1136. The BIA briefly refused to recognize Creek government under a constitution and bylaws approved by the Convention in 1944, but recognized in 1946 that the Convention had been acting as the official governing body of the Tribe since 1924. *Id.* at 1137-38. In the early 1950s, BIA again shifted direction, and dealt with a Council appointed by the Chief, instead of the elected Convention. *Id.* at 1138-39.

In the mid-1950s, BIA returned to its practice of appointing unelected Chiefs and treated them as the sole embodiment of Creek governmental authority. *Harjo*, 420 F. Supp. at 1139. Congress, by Act of Oct. 22, 1970, Pub. L. No. 91-495, 84 Stat. 1091, responded by recognizing the right of Five Tribes citizens to elect their chiefs "by popular selection." BIA, in a "determined use of its raw power," then misinterpreted that

law to require a "government by Principal Chief alone." *Id.* at 1143.

The Creek government was explicitly perpetuated by the Five Tribes Act, with the right to elect chiefs, and to exercise legislative functions. *Harjo*, 420 F. Supp. at 1118, 1141-43. In spite of DOI's "failure to make a conscientious effort to adhere to the provisions of law in dealing with the Five Tribes," the Creeks "refused to abandon their tribal government and political life." *Id.* at 1135. In 1979, after their successful challenge of DOI's interference with their government in *Harjo*, the Creeks reorganized under the OIWA and adopted a new constitution, which was approved by DOI. *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967, 970-71 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).

C. Fraudulent Land Transactions and Impoverishment of Creek Citizens

In 1901, oil was discovered on the Creek reservation. DEBO, WATERS RUN 86-87. This provided an additional incentive to those who were already eager to take tribal lands. Even before statehood, land companies were formed in Indian Territory for the unlawful exploitation of Indians. *Id.* at 117. A 1903 investigation revealed that every member of the Dawes Commission and nearly every high DOI official in Indian Territory held stock in one or more of these companies, and most were listed as officers and directors. *Id.* at 118.

Under the 1901 and 1902 Creek allotment agreements, the allottees owned their allotments in fee, subject to restrictions against alienation ("restricted allotments") for a five-year period, and, in the case of forty-acre homesteads, for twenty-one years. Act of Mar. 1, 1901, ch. 676, ¶7, 31 Stat. 861; Act of June 30, 1902, ch. 1323, § 16, 32 Stat. 500. This protection of restricted allotments was seemingly strengthened when the Five Tribes Act increased the restricted period for fullblood allottees to twenty-five years. § 19, 34 Stat. 137, 144. This was the same period established in the Dawes Act's protection of allotments held in trust by the United States on behalf of Indians ("trust allotments") under that act. § 5, 24 Stat. 388.

However, federal policy was already shifting toward removing protection of Indian lands. Shortly before enactment of the Five Tribes Act, Congress began eroding the Dawes Act's protection of trust lands allotted under that act, by amending it to authorize the Secretary to issue fee patents to "competent" allottees. Act of May 8, 1906, ch. 2348, 34 Stat. 182 ("Burke Act"), codified at 25 U.S.C. § 349. In 1910, competency commissions started visiting reservations nationwide, and in the next two years more than 200,000 acres of trust land were placed on the local tax rolls. HOXIE 176. Sales of trust allotments also increased, with 775,000 acres of inherited land being sold between 1902 and 1910, which represented "only a fraction of the total territory lost during those years." *Id.* at 160.

Consistent with the national trend, in 1908, Congress removed restrictions on the Five Tribes

allotments of freedmen, intermarried whites, and Indians of less than one-half Indian blood. Act of May 27, 1908, ch. 199, §§ 1, 4, 35 Stat. 312. Congress also gave state courts authority over the person and property of minor Five Tribes restricted allottees and authority to approve conveyances of restricted lands of the heirs of deceased allottees, *id.* at §§ 2, 6, 9.[2] acting as federal instrumentalities. *Springer v. Townsend*, 336 F.2d 397, 400 (10th Cir. 1964); *United States v. Gypsy Oil Co.*, 10 F.2d 487 (8th Cir. 1925).[3]

The state courts were often complicit in the steady stream of fraudulent land transactions that ensued. The Creek government attempted to protect the land of its citizens against these illegal conveyances. DEBO, WATERS RUN 103, 120. In 1912, M.L. Mott, an attorney for the Creeks, provided a report to Congress funded with Creek funds, based on an examination of the files in pending guardianship cases in several counties, which was supplemented by the December 31, 1923

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[2] Congress extended the restricted period for Five Tribes allotments inherited by heirs of at least one-half Indian blood until further act of Congress. *See* Act of May 10, 1928, ch. 517, § 1, 45 Stat. 495; Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731; Act of Aug. 11, 1955, ch. 786, § 1, 69 Stat. 666. Congress has also recognized Creek Nation's reversionary interest in restricted lands of an intestate decedent without heirs. *See* Act of Aug. 29, 1967, Pub. L. No. 90-76, § 3, 81 Stat. 177.

[3] The United States still maintains a significant role in state court proceedings involving restricted lands, including notice requirements, option to remove certain state proceedings to federal court, DOI attorneys' entries of appearances in state court proceedings, and approval of attorneys' fees. *See* §§ 1, 3, 4, 61 Stat. 731-33.

report of S.E. Wallen, Superintendent, Five Civilized Tribes Agency, and Mott's January 9, 1925 update. M.L. Mott, "A National Blunder" ("Mott Rep.") at 3, 11. *Murphy v. Royal*, Case No. 15-7041 (10th Cir.), Appellant's Br., App'x E (filed Aug. 5, 2016). Adult Indians, upon coming suddenly into large incomes by reason of oil or mineral development of their property, were taken into court and declared incompetent. Mott Rep. at 16-44. Non-Indian guardians charged Indian estates "the unprecedented" sum of 19.3 percent of their value, compared with 2.3 percent of the value of non-Indian estates. Mott Rep. at 3-4. Many Indian guardianship costs ran from 30 percent to 60 percent, and these "unconscionable and unjustified" costs resulted exclusively from the state courts' allowance of attorney and guardian fees. *Id.*

The pillaging of children's estates was also common, often as a result of unconscionable contracts between land companies and parents, and the theft of their property through the probate courts. DEBO, WATERS RUN 104, 106, 182. In 1923, a committee of the Oklahoma Bar Association recognized the severity of this situation in a resolution criticizing the dissipation of estates of Five Tribes citizens by the state court appointment of guardians and administrators "wholly incapable of handling business affairs, many of them graduates of the bankruptcy court," and by appointment of attorneys "on fat salaries . . . while the widows, orphans and wards go hungry and poorly clad." Mott Rep. at 2.

The value of oil property was an added inducement to crime. Speculators who had secured illegal leases resorted to forgery, kidnapping, and murder to acquire permanent possession. DEBO, WATERS RUN 181, 200. In 1935, John Collier, Commissioner of Indian Affairs, testified about the continued plundering of Five Tribes allotted lands. Hearings before the Comm. Ind. Affs., House of Rep., 74th Cong., 1st Sess. on H.R. 6234, "A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes" (May 7, 1935) at 194-216. He described numerous cases, including one that involved a minor Creek heir of valuable oil lands, who was kidnapped by conspirators working for an oil company, taken across state lines, forced to sign relinquishment of her oil allotment while intoxicated, and raped. *Id.* at 197. She was paid $1,000 and given clothing in exchange for the property, which produced $315,178.41 in royalties. *Id.* A state court found the conveyance valid; the rapist was indicted but not convicted; and disbarment proceedings against an attorney involved in the case failed. *Id.*

"[T]he entire Five Tribes area was dominated by a vast criminal conspiracy to wrest a great and rich domain from its owners." DEBO, WATERS RUN 196-97. Federal and state officials found it expedient to leave concerns about criminal activities involving Indians in the hands of the state, driven by the interests of oil developers and others intent on seizing Creek natural resources.

III. UNLAWFUL STATE PROSECUTIONS OF CRIMES DO NOT EVIDENCE RESERVATION DISESTABLISHMENT.

A. Introduction

The state's prosecution of offenses on the Creek reservation involving Indian offenders and/or victims with federal acquiescence does not evidence reservation disestablishment. These prosecutions were contrary to federal statutes and state and federal decisions concerning the allocation of state and federal jurisdiction by the Act of June 16, 1906, ch. 3335, 34 Stat. 267 ("Enabling Act"). When state jurisdiction over Indian country in the former Indian Territory was challenged in the 1980s, state and federal courts specifically rejected arguments that the Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 ("1897 Act"), the Act of June 28, 1898, ch. 517, 30 Stat. 495 ("Curtis Act"), and the Enabling Act conferred jurisdiction to the state over all crimes arising in the former Indian Territory.

B. Criminal Jurisdiction in Indian Territory

1. General Crimes Act and Major Crimes Act

The United States' policy concerning criminal prosecutions in "the Indian country" began with federal enactments as early as 1796. *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883). As of 1883, this federal policy was embodied in the General Crimes Act ("GCA") (a/k/a "Indian Country Crimes Act"), Rev. Stat. §§ 2145 and 2146, codified as amended in 18 U.S.C. § 1152.

See Ex parte Crow Dog, 109 U.S. at 558. Offenses enumerated and defined under the general laws of the United States which were committed in "the Indian country" by Indians against "white persons", and by "white persons" against Indians,[4] were federal offenses, and those by Indians against each other in "the Indian country" were left to each tribe according to its local customs. *Ex parte Crow Dog*, *id.* at 571-72 (murder of Indian by another Indian on Sioux reservation subject to tribal, rather than federal, jurisdiction under § 2146).

In direct response to *Crow Dog*, Congress enacted the Major Crimes Act, Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 ("MCA") (now codified, as amended, at 18 U.S.C. § 1153); *see United States v. Kagama*, 118 U.S. 375, 382-83 (1886); *United States v. John*, 437 U.S. 634, 649 n. 18 (1978). MCA conferred federal jurisdiction over certain enumerated major crimes by an Indian offender against an Indian or non-Indian victim, including murder, when committed on an "Indian reservation" within a state. § 9, 23 Stat. 362, 385.[5]

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[4] The federal government did not recognize tribal criminal jurisdiction over non-citizens in Indian Territory. 1886 Ann. Rep. of Comm. Ind. Aff. 91. It first began serious efforts to address the problem of non-Indian lawlessness by conferring criminal jurisdiction on federal courts located in adjacent states over offenses by the intruders, and later by establishing a federal court in Indian Territory. *See infra* n. 6.

[5] Reservation lands include fee lands within reservation boundaries. *United States v. Celestine*, 215 U.S. 278, 284-87 (1909). In 1948, MCA was amended to replace the term "reservation" with the broader term "Indian country," which was "used in most of the other special statutes referring to Indians. . . ." *See United States v. John*, 437 U.S. at 647 n. 16, 649 (citing 18 U.S.C. § 1153). The

2. 1890 Act and 1895 Act

In 1890, Congress authorized the establishment of a territorial government in portions of western and central Indian Territory, to be known as Oklahoma Territory. Act of May 2, 1890, ch. 182, §§ 1-28, 26 Stat. 81 ("1890 Act"). The Five Tribes' reservations and a small area occupied by eight tribes served by the Quapaw Agency remained in the reduced Indian Territory. §§ 29-44, 26 Stat. 93-100.

The 1890 Act divided jurisdiction over Indian Territory among the three United States courts previously authorized to serve Indian Territory.[6] § 33-35, 26 Stat. 81, 96-97. As courts of local jurisdiction, the courts enforced certain listed Arkansas laws, except "if in conflict with this act or with any law of Congress" and enforced Arkansas criminal laws "as far as they are

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1948 amendments also added a definition of "Indian country" based on this Court's definitions of Indian country in decisions issued after enactment of MCA. 18 U.S.C. § 1151; *see Donnelly v. United States*, 228 U.S. 243 (1913) (reservations); *United States v. Sandoval*, 231 U.S. 28, 47 (1913) (dependent Indian communities); *United States v. Pelican*, 232 U.S. 442 (1914) (trust allotments); and *United States v. Ramsey*, 271 U.S. 467, 469 (1926) (restricted allotments).

[6] *See* Act of Jan. 31, 1877, ch. 44, 19 Stat. 230 (federal court in Ft. Smith, Arkansas); Act of Jan. 6, 1883, ch. 13, § 3, 22 Stat. 400 (federal court for northern district of Texas with jurisdiction over offenses in described areas not set apart for any of the Five Tribes "against any of the laws of the United States now or that may hereafter be operative therein"); Act of Mar. 1, 1889, ch. 333, §§ 1, 5, 25 Stat. 783 (federal court in Muskogee, Indian Territory, with jurisdiction over "all offenses against the laws of the United States committed within the Indian Territory . . . not punishable by death or by imprisonment at hard labor").

applicable." §§ 31, 33, 26 Stat. 81, 94, 96. The application of Arkansas laws in Indian Territory was "merely provisional," to establish a body of laws for "matters of local or domestic concern" in the absence of a territorial government over Indian Territory. *Shulthis v. McDougal*, 225 U.S. 561, 571 (1912).

The federal courts in Indian Territory additionally enforced general federal laws, such as GCA, consistent with the 1890 Act's requirement that "all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States . . . shall have the same force and effect in the Indian Territory as elsewhere in the United States." § 31, 26 Stat. 81, 94. In cases where the laws of the United States and Arkansas laws concerned the same offense, "the laws of the United States shall govern as to such offense." *Id.* at § 33. "The tribes, however, retained exclusive jurisdiction over all civil and criminal disputes involving only tribal members, and the incorporated laws of Arkansas did not apply to such cases. *See id.* at § 30, 26 Stat. at 94." *Indian Country, U.S.A.*, 829 F.2d at 977-78.

In 1895, Congress repealed all laws that had previously conferred jurisdiction on the federal courts for the western district of Arkansas and the eastern district of Texas over certain offenses committed in Indian Territory, effective September 1, 1896. Act of Mar. 1, 1895, ch. 145, 28 Stat. 693 ("1895 Act"). The 1895 Act provided that "the jurisdiction now conferred by law upon said courts is hereby given from and after said date aforesaid to the United States court in Indian

Territory," and created three districts for that court. §§ 1, 9, 28 Stat. 693, 697. It gave the courts in Indian Territory "exclusive original jurisdiction of all offenses against the laws of the United States" committed in Indian Territory. *Id.* at § 9. The 1895 Act further provided that the laws of the United States and Arkansas "heretofore put in force in said Indian Territory" were to remain in "full force and effect" in Indian Territory, except so far as they were in conflict with the 1895 Act.

3. 1897 Act and 1898 Curtis Act

Two years later, Congress enacted the 1897 Act, which was "designed to coerce the tribes to negotiate with the Commission." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988). The 1897 Act provided that after January 1, 1898, the federal courts in Indian Territory "shall have original and exclusive jurisdiction and authority to try and determine all . . . criminal causes for the punishment of any offense committed" after that date. 30 Stat. 62, 83. It further provided that "the *laws of the United States* and the State of Arkansas in force in the [Indian] Territory shall apply to all persons therein, irrespective of race, said [federal] courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes." *Id.* (emphasis added). This "broadened the jurisdiction of the federal courts, thus *divesting the Creek tribal courts of their exclusive jurisdiction over cases*

involving only Creeks." Indian Country, U.S.A., 829 F.2d at 978 (emphasis added).[7]

The 1897 Act added an escape mechanism by providing that any agreement with a tribe, when ratified, would "operate to suspend any provisions of this Act if in conflict therewith as to said nation." 30 Stat. 62, 83. Congress understood that the threat to end exclusive Five Tribes jurisdiction over tribal members, together with this proviso, was "intended to drive them into an agreement with the Dawes Commission, and if they do not agree to it, they shall get this terrible blow. . . ." 29 Cong. Rec. 2310 (1897) (statement of Sen. Bate). ("One of the ugly features in this . . . is that while we are holding out to them the hand of negotiation we hold in the other hand a bludgeon with which to brain the Indian. Shame upon us!"). *Id.*

This coercion continued in the 1898 Curtis Act, which included numerous provisions related to the division of tribal lands into allotments for the use and occupancy of tribal citizens. 30 Stat. 495. One of the most coercive measures provided for the potential abolishment of "all tribal courts in Indian Territory" and the transfer of tribal court cases to the federal

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[7] Although lacking in clarity, the 1897 Act threatened an implied repeal of provisions in the 1890 Act, § 31, 26 Stat. 94, 96 (which preserved exclusive jurisdiction in "the courts of the civilized nations" over all cases involving tribal members as the sole parties). *See Talton v. Mayes*, 163 U.S. 376, 381 (1896) (finding that the Cherokee Nation had exclusive jurisdiction over an 1892 Cherokee murder in the Cherokee Nation under its treaties and the 1890 Act).

court in Indian Territory effective July 1, 1898, subject to the proviso that the Chickasaw, Choctaw, and Creek courts would be abolished effective October 1, 1898 unless they ratified agreements contained in § 29 (Choctaws and Chickasaws) and § 30 (Creeks) of the act. § 28, 30 Stat. 495, 504-05.

The Choctaws and Chickasaws ratified their agreement on August 24, 1898, before the deadline. Sixth Ann. Rep. of the Comm. Five Civ. Tribes (1899) at 9. The agreement, which was controlling over inconsistent provisions of the Curtis Act (except § 14, involving incorporation of towns), did not abolish Choctaw and Chickasaw courts, and included only a limited grant of federal court jurisdiction over certain land matters, homicide, embezzlement, bribery, disturbance of the peace, and carrying weapons. 30 Stat. 495, 505, 511.[8]

The Creeks did not ratify the agreement in § 30 of the Curtis Act, 30 Stat. 495, 514, by the deadline, and their later agreement provided that nothing in it would be construed to revive their courts. ¶47, 31 Stat. 861; *Woodward*, 238 U.S. at 311-12. However, the Creek agreement did not cede or return any Creek lands to the public domain, consistent with the continued existence of the reservation.

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[8] *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d at 1441-42. An appropriations act, Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015, 1027, later purportedly abolished Choctaw and Chickasaw Nation courts.

Congress ratified the Seminole Agreement, which expressly protected Seminole courts and contained only a limited grant of federal jurisdiction similar to the Choctaw and Chickasaw agreement, two days after enactment of the Curtis Act. Act of July 1, 1898, ch. 542, 30 Stat. 567.

The Cherokees were the last to enter into an agreement. Act of July 1, 1902, ch. 1375, 32 Stat. 716. Earlier unratified versions of the Cherokee agreement provided for the extinguishment of their courts. Sixth Ann. Rep. of the Comm. Five Civ. Tribes (1899), Appendix No. 2, § 71 at 49, 57; Seventh Ann. Rep. of the Comm. Five Civ. Tribes (1900) at 13, Appendix No. 1, § 80 at 37, 45. However, these provisions were omitted from the ratified agreement, which expressly provided that inconsistent statutes would not be in force, and expressly preserved only §§ 14 and 27 of the Curtis Act. § 73, 32 Stat. 716.

This inconsistent application of the 1897 Act and § 28 of the Curtis Act to the Five Tribes reflects the intent to force allotment – not to disestablish the Creek reservation for purposes of statehood. This interpretation is consistent with the 1936 enactment of the OIWA. The D.C. Circuit found that the OIWA, 25 U.S.C. § 5209, repealed the Curtis Act, and re-established Creek judicial authority, "subject to limitations imposed by statutes generally applicable to all tribes." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d at 1446-47. In reaching that conclusion, the Court rejected statutory interpretation offered by DOI that "would result

in a perpetuation of the piecemeal legislation rather than its elimination." *Id.* at 1445-46.

4. 1906 Oklahoma Enabling Act

The Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267 ("Enabling Act") ended any speculation as to the meaning of the 1897 Act, by replacing the application of Arkansas laws after statehood with "the laws in force in the Territory of Oklahoma, *as far as applicable*,"[9] "until changed by the legislature thereof." § 13, 34 Stat. 267, 275 (emphasis added). Section 16, as amended in 1907, required the transfer to the new federal courts of prosecutions of "all crimes and offenses" committed within Indian Territory "which, had they been committed within a State, would have been cognizable in the Federal courts." Act of Mar. 4, 1907, ch. 2911, § 1, 34 Stat. 1286. This includes crimes under GCA and MCA. *See United States v. Ramsey*, 271 U.S. 467, 469 (1926). Conversely, § 20 of the Enabling Act, as amended in 1907, established

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[9] The limited applicability of state criminal laws on the Creek reservation is reflected not only in the history leading up to enactment of the Enabling Act, but also by the Assimilative Crimes Act. Act of Mar. 4, 1909, ch. 321, § 289, 35 Stat. 1145, codified as amended in 18 U.S.C. § 13. The Assimilative Crimes Act authorizes federal courts to apply state laws defining offenses and punishments to crimes in Indian country within the state, in the absence of a federal law defining such offenses. *See Williams v. United States*, 327 U.S. 711, 718 (1946). *See also* Indian Country Criminal Jurisdictional Chart, W.D. OK (December 2010 version) at https://www.justice.gov/sites/default/files/usaowdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf.

state courts as successors to federal courts in Indian Territory for those civil and criminal cases that were not transferred to the new federal courts. § 3, 34 Stat. 1286, 1287.

Additionally, the Enabling Act preserved federal jurisdiction over Indians and their lands, § 1, 34 Stat. 267-68, and required the state to disclaim all right and title to such lands. § 3, 34 Stat. 267, 270. The Oklahoma Constitution contains the required disclaimer. Okla. Const. art. 1, § 3.

C. State and Federal Prosecutions in the Early History of the State

When Oklahoma became a state, Proclamation of Nov. 16, 1907, 35 Stat. 2160-61, it was already well settled that the authority of the United States to prosecute crimes not committed by or against Indians on reservations ended at statehood. *United States v. McBratney*, 104 U.S. 621, 624 (1881); *Draper v. United States*, 164 U.S. 240 (1896). Despite having no legal basis, federal and state officials acted as if statehood also marked the end of federal authority over prosecutions of all crimes by or against Indians in "Indian country" under GCA and on "reservations" under MCA.

This viewpoint was contrary to an early Oklahoma Supreme Court decision, *Higgins v. Brown*, 94 P. 703, 730 (Okla. 1908). Although *Higgins* did not involve claims that the crime occurred on a reservation, it provided guidance regarding any future cases involving Indian country jurisdiction. The Court found that § 16

of the Enabling Act was "intended to vest in the federal courts the continued prosecution of criminal cases of a federal character and to continue in the state courts the prosecutions of a local or municipal character." *Id.* at 725. It accordingly found that prosecutions under "a general law relating to crime against the United States of which a federal court would have had jurisdiction even had the crime been committed within a state" (such as MCA and GCA) were to be transferred to the federal courts. *Id.* at 725. *See also Ex parte Buchanen*, 94 P. 943, 944-45 (Okla. Crim. App. 1908); *Ex parte Curlee*, 95 P. 414 (Okla. Crim. App. 1908) ("Of course, non-pending actions of a federal character would necessarily vest in the United States courts in the state erected out of said [Oklahoma and Indian] territories just as they do in United States courts in the other states.").

A few years after these Oklahoma decisions, this Court ruled that Oklahoma statehood did not change the Indian country status of lands in Indian Territory or the applicability of federal criminal laws on those lands. *United States v. Wright*, 229 U.S. 226 (1913).[10] In *Wright*, the United States charged the defendant in federal court in Oklahoma for violation of Rev. Stat. § 2139, which prohibited introduction of liquor into "Indian country." *Id.* at 226-27. This Court concluded

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[10] An earlier decision of this Court, *Hendrix v. United States*, 219 U.S. 79, 90 (1911), offers no guidance. It did not address or reference GCA, MCA, the reservation status of the crime site, or the United States' argument that the Enabling Act withdrew Indian Territory from federal jurisdiction.

that § 2139 was applicable to "Indian country" throughout the states and territories generally, and that the Enabling Act did not repeal its applicability in Oklahoma. *Id.* at 238; *see also United States Exp. Co. v. Friedman*, 191 Fed. 673, 678-79 (8th Cir. 1911) (rejecting broad contention "Indian Territory ceased to be Indian country upon the admission of Oklahoma as a state"); and *Southern Surety Company v. State of Oklahoma*, 241 U.S. 582, 585-86 (1916) ("[T]he test of the jurisdiction of the state courts was to be the same that would have applied had the Indian Territory been a state when the offenses were committed.").

In sum, any claim that state prosecutions of all crimes in Creek Nation constituted "universal acknowledgement" of reservation disestablishment cannot withstand the principles set forth in early state and federal judicial interpretations of the Enabling Act.

D. State Failure to Follow Supreme Court Decisions Recognizing Federal Criminal Jurisdiction over Offenses on Trust and Restricted Allotments

Less than two years after statehood, state and federal prosecutors were put on notice that trust allotments are Indian country for purposes of prosecutions under GCA. In *United States v. Pelican*, the Court held that Colville trust allotments "remained Indian lands set apart for Indians under governmental care" and were Indian country for purposes of a federal murder prosecution under GCA, Rev. Stat. § 2145. *Pelican*, 232

U.S. at 449. The Court declared that the United States' territorial jurisdiction did not "depend upon the size of the particular areas which are held for Federal purposes." *Id.* at 449-50.

If there was any question that a restricted allotment in Oklahoma is Indian country for purposes of prosecutions under GCA, this Court resolved that question in *Ramsey*, 271 U.S. at 471-72.[11] Citing the *Pelican* case, the Court ruled that a restricted Osage allotment crime site was Indian country for purposes of the GCA prosecution of two non-Indians for the murder of an Osage. *Id.* This decision put state and federal officials on notice that the federal courts had jurisdiction under the GCA over offenses on trust and restricted allotments, regardless of reservation status, including prosecutions of non-Indians for crimes against Indians. Yet the state continued its unlawful prosecutions. This exercise of jurisdiction did not impact the Indian country status of Creek reservation lands. *See United States v. John*, 437 U.S. at 652-54.

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[11] Federal investigation of the *Ramsey* case, which involved one of the numerous murders motivated by greed for the huge wealth of Osage mineral headright owners, was prompted by J. Edgar Hoover's desire to avoid scandal and protect his 1924 appointment as the director of the "Bureau of Investigation." DAVID GRANN, KILLERS OF THE FLOWER MOON – THE OSAGE MURDERS AND THE BIRTH OF THE FBI 116, 120 (2017). Because it was believed that it was "not only useless but positively dangerous" to try the case in the state legal system, federal attorneys filed the case in federal court, after which an appeal of dismissal on jurisdictional grounds reached this Court. *Id.* at 214.

E. Continued Unlawful State Prosecutions: *Nowabbi* and Public Law 280

State and federal prosecutors largely ignored the *Ramsey* decision, and persevered in their position that the state had jurisdiction to prosecute all crimes on all lands in the former Indian Territory. OCCA agreed with the state's position in 1936 and ruled that the state court had jurisdiction to prosecute the Choctaw murder of a Choctaw on a restricted allotment. *Ex parte Nowabbi*, 61 P.2d 1139, 1156 (Okla. Crim. App. 1936) (overruled in *State v. Klindt*, 782 P.2d 401, 403-04 (Okla. Crim. App. 1989)). The Court found that land within the former Indian Territory was not Indian country within the meaning of GCA and was not a reservation within the meaning of MCA. OCCA erroneously concluded the Burke Act, which applied only to allottees under the Dawes Act, took "the Indians in the Indian Territory out of the category of Reservation Indians," and limited "the jurisdiction of the United States over allotments in the Indian Territory." *Id.* at 1154.

When Congress enacted the Act of Aug. 15, 1953, ch. 505, Pub. L. No. 66-280, 67 Stat. 588 ("P.L. 280") in 1953, Oklahoma declined to exercise the option of voluntarily assuming complete civil and criminal jurisdiction over Indian country within its boundaries. Fifteen years later Congress amended P.L. 280 to require tribal consent to acquire such jurisdiction. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 80, codified 25 U.S.C. §§ 1321-1326. Oklahoma has never requested

tribal consent, nor has it been given. *State v. Littlechief*, 573 P.2d 263 (Okla. Crim. App. 1978).

F. Recognition of Indian Country in Oklahoma

Although the state's claim of Creek reservation disestablishment is the only issue in the present case, it is important to consider Oklahoma-specific court decisions involving restricted trust allotments, unallotted tribal fee lands, and tribal trust lands that have been issued during the past forty years. These decisions have repeatedly rejected a theory, once again advanced by Petitioner and *Amici* in this case, based on misinterpretation of the 1897 Act, the 1898 Curtis Act, and the Enabling Act. They also caused a seismic shift in the jurisdictional landscape in Oklahoma beginning in the late 1970s.

The state's unlawful exercise of criminal jurisdiction affected all Indian lands within its borders for the first seventy years of statehood, including Indian trust allotments in western Oklahoma. This changed in 1978, when OCCA held that a Kiowa trust allotment was Indian country under 18 U.S.C. § 1151(c), and that prosecution of a Kiowa for the murder of a Kiowa was subject to federal jurisdiction. *State v. Littlechief*, 573 P.2d at 265; *see also Ahboah v. Housing Authority of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983) (Kiowa trust allotment is Indian country); *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985) (*Ramsey* applies to crime on restricted Osage allotment held by an heir

of original allottee). The Indian country status of trust allotments in western Oklahoma is so well settled that for the past twenty years the Office of the United States Attorney, Western District of Oklahoma, has maintained an Indian country misdemeanor docket for certain offenses in Indian country in western Oklahoma, particularly those where a non-Indian is the perpetrator and there is an Indian victim. United States' Attorney's Office, W.D. Okla., "Indian Country Misdemeanor Prosecution Project," *Tribal Justice*, Issue 2 (2012) at 2.[12]

The Indian country status of restricted allotments and tribal trust and fee lands in eastern Oklahoma is equally well settled. In 1986, the Oklahoma Supreme Court rejected the state's claim that it had jurisdiction to regulate bingo games operated on tribal trust lands by the Seneca-Cayuga Tribe, a small tribe that remained in Indian Territory after passage of the 1890 Act. *May v. Seneca-Cayuga Tribe of Okla.*, 711 P.2d 77, 78 (Okla. 1986). After describing pre-statehood federal laws that specifically referenced "Indian Territory," including the 1890 Act, the 1897 Act, and the Enabling Act, *id.* at 81 n. 16, the Court determined that Seneca-Cayuga trust land is Indian country as defined by § 1151(c), citing *Pelican*, *Burnett* and *Littlechief*. *Id* at 82, 83 n. 21-24.

In 1989, OCCA ruled that an individual restricted Cherokee allotment in the former Indian Territory is Indian country for purposes of criminal jurisdiction.

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[12] *See* https://turtletalk.files.wordpress.com/2012/11/tribal-justice-issue-2-final.pdf.

State v. Klindt, 782 P.2d 401 (Okla. Crim. App. 1989). OCCA expressly overruled *Nowabbi*, noting "[t]here is ample evidence to indicate that the *Nowabbi* Court misinterpreted the statutes and cases upon which it based its opinion." *Id.* at 404; *see also Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) (finding no jurisdiction over a murder on a restricted Chickasaw allotment and rejecting the United States' position that Oklahoma has exclusive jurisdiction over the former Indian Territory as a "result of congressional enactments around the turn of the century," citing *Seneca-Cayuga* and *Klindt*).

The first federal case involving Indian country jurisdiction in Creek Nation involved the state's unsuccessful attempt to regulate tribal bingo operations on Creek unallotted land (known as the Mackey site). *Indian Country, U.S.A., Inc.*, 829 F.2d at 976. The Tenth Circuit found "unpersuasive" Oklahoma's argument that it acquired complete jurisdiction of the Five Tribes' members and their lands within the former Indian Territory based upon a "combination of federal legislation enacted prior to statehood and language in the Oklahoma Enabling Act." *Id.* at 976-77. The Court concluded these laws did not divest the federal government of authority over Creek tribal lands, did not abolish Creek Nation's legislative authority of such lands, and did not evince a clear intent by Congress to permit the state to assert jurisdiction. *Id.* at 981. The United States agreed that the Tenth Circuit "correctly analyzed the complex history of congressional dealings

with the Creek Nation and its land" when it opposed the state's petition for certiorari,[13] which was denied.

A few years later, *after* the United States' successful federal court prosecution of a Creek for murder of a Creek on a restricted allotment under MCA, the United States changed course in the case on appeal and returned to "its frequently raised, but never accepted, argument" that the federal courts had no jurisdiction based on the 1897 Act, the Curtis Act, and the Enabling Act. *United States v. Sands*, 968 F.2d 1058, 1061-62 (10th Cir. 1992), *cert. denied*, 506 U.S. 1056 (1993). The Tenth Circuit disagreed, finding that these laws "did not abrogate the federal government's authority and responsibility, nor allow [criminal] jurisdiction by the State of Oklahoma" over restricted Creek allotments. *Id.* at 1062. *See also Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990) (Cherokee tribal trust land is Indian country); *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) (Choctaw tribal trust land is Indian country).

The existence of Indian country in western and eastern Oklahoma has been well established by state and federal decisions for decades. These decisions have repeatedly rejected the United States'

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[13] Br. for U.S. as *Amicus Curiae*, *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, No. 87-1068 (U.S. Oct. Term 1987) at 4. The United States also stated that, although Creek lands acquired under the removal treaties were not referred to as a reservation, the lower court correctly found "that no such formal designation is required." *Id. See* https://www.justice.gov/osg/brief/oklahoma-tax-commission-petitioner-v-muscogee-creek-nation-et-al.

misunderstanding of pre-statehood laws and state prosecutors' blanket assertion of state jurisdiction in the former Indian Territory. The federal government has recognized that Oklahoma has no jurisdiction over Indian against Indian offenses in Indian country since 1979, when it established Courts of Indian Offenses serving western Oklahoma, "Law and Order on Indian Reservations," 44 Fed. Reg. 37502-01 (June 27, 1979), and again in 1992 when it established such courts in eastern Oklahoma for those tribes that had not yet developed tribal courts. "Law and Order on Indian Reservations," 57 Fed. Reg. 3270-01 (Jan. 28, 1992). The Creek and Cherokee Nations were already operating court systems and continue to do so. The Courts of Indian Offenses serving the Choctaw, Chickasaw, and Seminole Nations have also been replaced with tribal courts.

Any theory that pre-statehood allotment laws disestablished the Creek reservation cannot be reconciled with the decisions involving the Indian country status of restricted allotments and tribal trust and fee lands in eastern Oklahoma. A finding by this Court that the Enabling Act and other federal legislation resulted in Creek reservation disestablishment would cast a shadow over these precedents and cause statewide repercussions concerning their implementation.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

List of *Amici Curiae*

Gregory Ablavsky (Ph.D., J.D., University of Pennsylvania) is an assistant professor at Stanford College of Law. Dr. Ablavsky's scholarship focuses on early American legal history, particularly on issues of sovereignty, territory, and property in the early American West. A lawyer and historian, his publications examining the history of Native sovereignty under federal law include "Beyond the Indian Commerce Clause," 124 YALE L.J. 1012 (2015) and "The Savage Constitution," 63 DUKE L.J. 999 (2014). His book project "Federal Ground: Sovereignty, Property, and Law in the U.S. Territories, 1783-1802," is under contract with Oxford University Press. His work has received the Cromwell Article Prize and the Kathryn T. Preyer Prize from the American Society for Legal History.

C. Joseph Genetin-Pilawa (Ph.D., Michigan State University) is Associate Professor of History at George Mason University, and co-editor of the *Journal of the Gilded Age and Progressive Era* (2017-2022). Dr. Genetin-Pilawa is the author of *Crooked Paths to Allotment: The Fight over Federal Indian Policy after the Civil War* (University of Nebraska Press, 2012), and the co-editor of *Beyond Two Worlds: Critical Conversations on Language and Power in Native North America* (SUNY Press, 2014). He has held fellowships at the Smithsonian Institution and at the Kluge Center (Library of Congress).

Frederick Hoxie (Ph.D. Brandeis University) is Professor Emeritus of History at the University of Illinois,

Urbana-Champaign. His scholarship focuses on the history of indigenous peoples in North America. He has written numerous books, book chapters and articles, including *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (1984), and *"The Reservation Period, 1880-1960,"* in The Cambridge History of the Native Peoples of the Americas, North America (1995). Dr. Hoxie's research has been supported by fellowships from the Rockefeller and Mellon Foundations, the National Endowment for the Humanities, and the Huntington Library.

Stacy Leeds (J.D., University of Tulsa College of Law, LLM University of Wisconsin Law School) is Dean Emeritus and Professor, University of Arkansas School of Law.[1] Her publications include *Mastering American Indian Law* (2016), "Reassessing Concurrent Tribal-State-Federal Criminal Jurisdiction in Kansas," Kansas Law Review (2011), and "Defeat or Mixed Blessing – Tribal Sovereignty and the State of Sequoyah," Tulsa Law Review (2007). Professor Leeds has received many awards, including the American Bar Association's Spirit of Excellence Award. She is an elected member of the American Law Institute and was an Alphonse Fletcher, Sr. Fellow with affiliation to the W.E.B. DuBois Institute at Harvard University and a William H. Hastie Fellow, University of Wisconsin. Professor Leeds is a Cherokee citizen, has served as a Cherokee Nation Supreme Court Justice and is the only

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[1] This brief is filed on behalf of Stacy Leeds in her personal capacity. Title is for identification purposes only.

American Indian woman to have served as law school dean in the United States.

Tom E. Luebben (G.Pe., Colorado School of Mines, J.D., New York University School of Law) has taught as adjunct professor of law at the University of New Mexico, guest lectured at the University of Arizona School of Law, and has taught seminars on tribal jurisdiction, Indian land rights, and many other areas of federal Indian law. Mr. Luebben's practice focuses on tribal government representation and protection of tribal natural resources. He served as lead counsel for the plaintiffs in *Harjo v. Kleppe*, and has represented Indian tribes, organizations and individuals located throughout the United States, including Oklahoma, Alaska, Arizona, California, Colorado, Hawaii, Nevada, and New Mexico.

Devon A. Mihesuah (Ph.D., Texas Christian University) is the Cora Lee Beers Price Teaching Professor in International Cultural Understanding, University of Kansas. Dr. Mihesuah, a Choctaw member, is the author of *Ned Christie: The Creation of an Outlaw and Cherokee Hero* (University of Oklahoma Press 2018), *Choctaw Crime and Punishment: Intersections of Resistance, Politics and Justice*, 1884-1907 (University of Oklahoma Press 2009); and has published numerous journal essays, book chapters, and commentaries. She served as editor of the American Indian Quarterly for nine years, and is the recipient of grants, fellowships and awards from the Ford Foundation, National Endowment for the Humanities, Smithsonian Institution,

Oklahoma Writers' Federation, and Oklahoma Historical Society, among many other organizations.

Lindsay Robertson (M.A., Ph.D. History, J.D., University of Virginia) is the Faculty Director of the Center for the Study of American Indian Law and Policy, University of Oklahoma College of Law; Chickasaw Nation Endowed Chair in Native American Law; and Sam K. Viersen Family Foundation Presidential Professor. Dr. Robertson teaches courses in Federal Indian law, comparative and international indigenous peoples law, and constitutional law and legal history. He is the author of *Conquest by Law* (Oxford University Press 2005). He is the founding director of the International Human Rights Law Clinic, was the recipient of the first David L. Boren Award for Outstanding Global Engagement, is an elected member of the American Law Institute and the American Bar Foundation, and serves as a justice on the Supreme Court of the Cheyenne and Arapaho Tribes.

Casey Ross (J.D., M.B.A., Oklahoma City University) is the Director of the American Indian Law and Sovereignty Center at Oklahoma City University (OCU) School of Law, where she oversees the American Indian Law program, teaching the American Indian wills clinical course and doctrinal courses that include tribal law and Federal Indian law. Professor Ross also serves as OCU general counsel and as faculty for the Native American Enterprise Management Certificate Program, OCU Meinders School of Business. Professor Ross' scholarship focuses on Indian land and property issues in Oklahoma. She has published works in the

areas of Indian child welfare, domestic violence and taxation in tribal communities. Professor Ross is a member of the Cherokee Nation.

Mark R. Scherer (J.D., Ohio State University; Ph.D. University of Nebraska-Lincoln) is Professor of History at the University of Nebraska-Omaha, where he teaches and publishes primarily in the fields of U.S. political, legal, and constitutional history, the regional history of Nebraska and the Great Plains, and Native American legal history. His publications include *Imperfect Victories: The Legal Tenacity of the Omaha Tribe*; and *Voices of Native American History: Challenges of the Contemporary World, 1933 to the Present*. He has recently completed *Echo of Its Time: The History of the Federal District Court of Nebraska, 1867-1933*, co-authored with John R. Wunder.

Rennard Strickland (J.D., S.J.D., University of Virginia), is the senior scholar in residence at the University of Oklahoma School of Law and the Knight Dean Emeritus at the University of Oregon School of Law. Dr. Strickland, a member of the Cherokee Nation, is the only faculty member tenured at all three of the ABA approved law schools in Oklahoma. He was the editor-in-chief of the revision of *Cohen's Handbook on Federal Indian Law* (1982 ed.). His many books include *The Indians of Oklahoma* (University of Oklahoma Press 1980) and *Fire and the Spirits, Cherokee Law from Clan to Court* (University of Oklahoma Press 1975). Dr. Strickland has served as president of the Association of American Law Schools and dean at four different law schools.